



## **BOARD OF FORESTRY AND FIRE PROTECTION**

### **REVIEW OF EXISTING UNPROCESSED TIMBER EXPORT RESTRICTIONS**

**JUNE 2014 MEETING**

## **EXPORT: BACKGROUND AND HISTORY, EXISTING STATUS, PROPOSED REGULATIONS**

### **I. EXPORT ADMINISTRATION ACT OF 1979— KEY PROVISION**

- Banned export of western redcedar and waney lumber from State and Federal lands in the continental United States. Exception by license only.

Western redcedar was banned from export because the old-growth was specifically suited for the manufacture of shakes and shingles, among other products. But domestic manufacturing mills were being outbid for the old-growth trees by exporters and therefore were left scrambling for supplies.

In accordance with the act, unprocessed western redcedar timber continues to be banned from export from the United States to any destination, including Canada, except with a valid export license. The last of these licenses was issued on September 30, 1979. Once processed into specific manufactured products, western redcedar is exportable.

### **II. FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT OF 1990—KEY PROVISIONS**

- Greatly restricts substitution policy and prohibits indirect substitution.
- Sourcing areas defined.
- Prohibits almost all log exports from state-owned and federally owned lands in the continental United States.
- Department of Commerce is the overseeing body.
- Revises surplus species determinants.

The export ban on federally owned timber based on the riders to the appropriation acts seemed to provide a sufficient domestic supply, until a recession hit in the mid to late 1980s. Occurring at a time when much of the private timber supplies of harvestable age had been tapped and harvested, this recession severely crippled the forest industry. “About 80% of the raw logs cut on lands owned by Washington State and about half of those harvested on Oregon State lands in 1987 were shipped overseas without being processed.”

While demand for log exports was increasing exponentially throughout the 1970s and early 80s, environmentalists were arguing that large areas of wildlife habitat were being harvested and exported to foreign markets, and small mills were clamoring that they could not competitively bid for private or State timber against the larger firms and Japanese investors. In response to these concerns, Congress began considering further curbs on log exports. Numerous bills, some similar to those drafted in the early 1970s, were introduced into the House and Senate to limit log exports.

One bill eventually did pass. Approved August 20, 1990, and effective January 1, 1991, the Forest Resources Conservation and Shortage Relief Act of 1990 essentially prohibited log exports from all public lands west of longitude 100 degrees W. in the lower 48 States, except for a conditional 25 percent of Washington State-owned timber. With the exception of the export restriction applying specifically to unprocessed western redcedar enacted in 1982, FRCSRA 1990 was the first Federal attempt to impose a blanket restriction on unprocessed timber from Federal **and** State lands.

The act provided for the Secretary of Commerce to declare certain volumes, quantities, and species surplus on Federal lands, as can the Secretaries of Agriculture and the Interior. All species determined to

be surplus are to be subject to review at least once every 3 years. The blanket prohibition also included indirect (for example, third party) substitution, in addition to direct substitution, for the first time in the history of the Federal regulations.

Congress also determined that no person could “purchase from any other person unprocessed timber...if such person would be prohibited from purchasing such timber directly from a department or agency of the United States”, thus making indirect substitution illegal.

Under the appropriations riders of the 1970s and 80s, direct substitution had been allowed, depending on the supervisory agency with certain specifications in regard to their historic level. The proportion of allowable substitution available to purchasers in earlier years through purchasing and exporting quotas was precluded with this legislation, though a limited transition period was incorporated. Sourcing (or market) areas are the alternatives in FRCSRA 1990 to the historical quotas.

The sourcing areas, established in predetermined geographic locations, allowed a purchaser with multiple operations in more than one geographic region to purchase public timber for domestic processing, while purchasing private timber for export as long as it had been harvested in a different market or sourcing area.

By defining sourcing areas, the act allowed a purchaser with multiple operations to purchase Federal timber and privately owned timber without committing substitution. For example, firms with timber operations in both Oregon and in Washington can purchase Federal timber in a sourcing area of eastern Oregon for primary manufacture while also purchasing private timber in Washington for export. This is considered feasible because it would be uneconomical to transport timber from Oregon to Washington in order to substitute it for private timber exports.

According to the interim rules established within FRCSRA 1990, to be approved for a sourcing area, a person (company) must not have exported unprocessed timber from private lands within that sourcing area in the previous 24 months; they also could not export that timber from that area once approved.

The most drastic measure of FRCSRA 1990, however, was the provision prohibiting State-owned timber from export without first undergoing primary processing. This was the first Federal provision absolutely prohibiting the export of State-owned timber.

### **III. NINTH CIRCUIT APPEALS COURT DECISION—KEY PROVISION**

- The Ninth Circuit Court of Appeals found unconstitutional the provisions that prohibit the export of logs originating from State lands.

Opponents of the various statutory and administrative provisions prohibiting exports of logs harvested on Western State lands included State agencies themselves. Several States hold large acreages of timberland, in trust for schools, universities, and other state institutions. Revenues were affected sharply by removal of export markets. Even the State Forester of Oregon, who oversaw fairly strict existing State log export policies stated that:

*Implementation of these rules may reduce competition for timber sales at auctions and could reduce the prices bid for State timber sales. Reduced timber sale prices could result in reduced revenue flows to the State Common School Fund, to the counties and local taxing districts with Board of Forestry timber, and to the State Department of Forestry. It is impossible to estimate the magnitude of possible price and revenue*

*reductions...[or] to estimate what benefits may result to local economies by making more timber available for domestic processing.*

State agencies took umbrage with the way the act was worded. The FRCSRA 1990 stated that the “Governor of each State to which this title applies, or such other State official as the Governor may designate, **SHALL**...issue regulations to carry out the purposes of this section” [emphasis added].<sup>40</sup> Therefore, several Washington State counties, and the Washington State Boards of Education and Natural Resources sought a judicial declaration holding that some of the provisions of FRCSRA 1990 were unconstitutional.

The District Court supported the Federal ban on log exports from Washington State lands. But on May 4, 1993, the Ninth Circuit Court of Appeals in San Francisco reversed this lower court’s decision.

Essentially, the court ruled that Congress cannot require a State to enact a Federal regulatory program.

Because the parts cited as unconstitutional were not severable, the court ruled that the entire section banning exports from State lands was unconstitutional. However, the entire paragraph 620c was “severable” from the rest of FRCSRA 1990 (see foot- note 41); therefore, if the paragraph was removed, then the ruling would not invalidate Federal export restrictions on Federal lands.

As a result of the Circuit Court’s decision, local policy actions were expected by State and private agencies in response to this ruling, but few expected the Federal legislative remedy to appear so soon after the ruling. The Forest Resources Conservation and Shortage Relief Amendment Act of 1993 (FRCSRAA 1993)<sup>42</sup> was introduced and signed less than 2 months after the previous act had been declared unconstitutional and was effective, retroactively, June 1, 1993.

#### **IV. FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF AMENDMENT ACT OF 1993—KEY PROVISION**

- Gave the governors discretionary power to ban log exports. Directed Congress to enact a ban if the governors did not.

The FRCSRAA 1993 was introduced on June 8, 1993, barely a month after FRCSRA 1990 was ruled unconstitutional. It passed the Senate by unanimous vote on June 17, was presented to President Clinton the next day, and signed into law July 1, 1993.

In response to the Supreme Court ruling, Congress revised the State provision of the act by giving the governors discretionary power, as opposed to mandatory power, to ban log exports. Also included in the revised legislation was the right to give Congress the power to enact a ban if the governors did not do so.

Other fundamental changes embodied in the act include a provision for a ban on the export of all timber from State lands; neither Washington nor any other state west of longitude 100 degrees W. within the continental United States was allowed to export timber from State lands. A paragraph banning direct and indirect substitution applying specifically to State lands (405(b)(3)) also was amended.

A section IV was included in FRCSRAA 1993, which had not been in the previous act, to account for severability of the individual provisions within the act if they were eventually challenged and deemed unconstitutional.

## V. CALIFORNIA HISTORY

Key regulations	Year
California Public Resources Code, Section 4650.1	1973
Proposition 130	1990
AB790	1993

California's first log export restrictions appeared in 1973. These restrictions, enforced by the California Department of Forestry and Fire Protection, prohibited the sale of State-owned or managed timber to a primary manufacturer outside of the United States, and prohibited the purchase of timber which was intended to be used as a direct or indirect substitute for timber from private lands owned or under control of the purchaser within 200 miles of the sale boundary, (in other words, the market area). These regulations specified that:

*...timber from State forests shall not be sold to any primary manufacturer or to any person for resale to primary manufacturer who makes use of such timber at any plant not located within the United States unless it is sawn on four sides to dimensions not greater than 4 inches by 12 inches.*

A comment released by the California State Forester's Office noted that having "only four commercial State forests totaling about 69,000 acres with an annual cut of 35 million board feet," truly minimized the impact of the public resources code. Violators were then prohibited from purchasing State forest timber for 5 years. This rule was in effect until 1984.

After the Ninth Circuit Court of Appeals made its decision declaring Alaska's statute restricting log exports from State lands unconstitutional in 1984, California's attorney general decided that the current law in California would continue to be enforced until it was overturned or removed by the legislature. The attorney general concluded that a State agency does not have the power to declare a statute unenforceable (or unconstitutional), regardless of a circuit court decision.

The Department of Forestry therefore will have to wait for the California court or a Federal court to specifically invalidate that portion of PRC 4650.1 before they stop enforcing it. Hence, the ban imposed in 1974 is still on the books today, restricting log exports originating from State lands in California.

Other legislation has been proposed in California to further restrict log exports. An unsuccessful initiative, Proposition 130, was introduced in California after the Federal public lands restrictions went into place in 1990. It was intended to go beyond the limitations suggested by FRCRA 1990 (see footnote 33) by extending the export restrictions to limit exports from private lands as well as prohibit the State from buying timber or timber products from anyone selling timber for foreign export (the assumption here is that timber implies logs). Also known as the Forest and Wildlife Protection and Bond Act of 1990, this unsuccessful ballot measure would have permitted owners to use the clearcutting method for no more than 12.5 percent of their harvest until 1996, provided that they did not, among other things, sell logs directly or indirectly for foreign export.

In 1993, California's legislature revised the State's export restrictions for timber from State-owned lands. The 1973 substitution language was dropped, but its intent was retained by prohibiting timber sales from

State forests to firms that had sold un-processed timber from private lands to foreign purchasers within the previous year or within a year after the end of the firm's timber-sale contract with the State.

Unprocessed timber is defined in current law as it is in FRCSRAA 1993. The existing maximum size for exported sawn wood—4 by 12 inches—was retained. However, export of clear cants less than 12 inches thick was permitted, as was shipment abroad of waney cants of lower grades, less than 8-3/4 inches thick. Western redcedar was excepted from these cant rules.

Exports of other wood products were expressly permitted. These included poles, piling, chips, veneer, plywood, shakes and shingles, aspen (*Populus* spp.) pulpwood bolts, and logs destined for chip-making.

The 1993 law also established penalties. Violators are prohibited from purchasing State forest timber for 5 years and may have their operating license suspended for up to 1 year.

## **VI. CURRENT CALIFORNIA LAW REGARDING EXPORTS**

### **STATUTES: PUBLIC RESOURCES CODE - DIVISION 4. FORESTS, FORESTRY AND RANGE AND FORAGE LANDS, PART 2, CHAPTER 9, ARTICLE 3. State Forests**

#### **4650.1.**

(a) Notwithstanding any other provision of law, timber from state forests shall not be sold to any California division of a primary manufacturer, or to any person for resale to a primary manufacturer, who does either of the following:

(1) Uses that timber at any plant not located within the United States unless it is sawn on four sides to dimensions not greater than 4 inches by 12 inches.

(2) Within one year prior to the bid date and one year after the termination of the contract, sells unprocessed timber, which is harvested from private timberlands and is exported into foreign commerce from this state.

(b) Any purchaser of timber from state forests who makes use of timber in violation of paragraph (1) of subdivision (a) is prohibited from purchasing state forest timber for a period of five years and may have his or her license suspended for a period of up to one year.

(c) The department may adopt appropriate regulations to prevent the substitution of timber from state forests for timber exported from private timberlands.

(d) For purposes of this section, "unprocessed timber" means trees or portions of trees or other roundwood not processed to standards and specifications suitable for end product use, but does not include timber processed into any of the following:

(1) Lumber or construction timbers, except Western Red Cedar, meeting current American Lumber Standards Grades or Pacific Lumber Inspection Bureau Export R or N list grades, sawn on four sides, not intended for remanufacture.

(2) Lumber, construction timbers, or cants for remanufacture, except Western Red Cedar, meeting current American Lumber Standards Grades or Pacific Lumber Inspection Bureau Export R or N list clear grades, sawn on four sides, not to exceed 12 inches in thickness.

(3) Lumber, construction timbers, or cants for remanufacture, except Western Red Cedar, that do not meet the grades referred to in paragraph (2) and are sawn on four sides, with wane less than  $\frac{1}{4}$  of any face, not exceeding  $8\frac{3}{4}$  inches in thickness.

(4) Chips, pulp, or pulp products.

(5) Veneer or plywood.

(6) Poles, posts, or piling cut or treated with preservatives for use as such.

(7) Shakes or shingles.

(8) Aspen or other pulpwood bolts, not exceeding 100 inches in length, exported for processing into pulp.

(9) Pulp logs or cull logs processed at domestic pulp mills, domestic chip plants, or other domestic operations for the purpose of conversion of the logs into chips.

*(Amended by Stats. 1993, Ch. 964, Sec. 1. Effective January 1, 1994.)*

#### **REGULATIONS, TITLE 14 CCR**

##### **§ 1515. Bids Solicitation.**

The Director, when selling or soliciting bids for sale of timber from state forests, shall condition the sale upon agreement of the purchaser that said timber will not be substituted for timber exported from private lands under control of the bidder, or affiliate.

##### **§ 1516. Non-Substitution Agreement.**

Every purchaser of timber from state forests shall execute an agreement with the Director that said timber will not be substituted for timber exported from the purchaser's private lands.

##### **§ 1517. Notice of Removal.**

The purchaser, before removal of timber from state forests, shall give written notice to the Director of any or all locations where said timber will be processed. Said notice shall be required for all of said timber until such time as the timber has been sawn to dimensions of 4 inches by 12 inches (10.2 cm by 30.5 cm) or less.

##### **§ 1518. Transfer Requirement.**

Upon transfer of state timber not receiving primary manufacture, the purchaser shall require the transferee to agree to the same substitution restrictions as are imposed on purchaser. Within 5 days of said transfer, a copy of the agreement, together with location of intended processing of said timber, shall be delivered by purchaser to the Director.

##### **§ 1519. Preservation of Records.**

Purchaser shall preserve for a period of 3 years, after conclusion of removal of timber from the state forest, all records pertaining to the use and disposition of the state timber and, upon request of the Director, make said records available for inspection by the Director.

§ 1520. Violation.

## **HISTORY**

1. Repealer filed 2-1-83; effective thirtieth day thereafter (Register 83, No. 6).

§ 1521. Notice of Violation and Review.

If the Director determines that a purchaser has violated any provision of these regulations, a Notice of Violation shall be sent by certified mail to purchaser with the further statement that purchaser shall be prohibited from purchasing state timber for a period of 5 years from the date of violation and said notice will designate the period of suspension of the timber operator permit, if any, not exceeding a period of 6 months from the date of notice. Within 30 days of said notice, purchaser may make written appeal to the Director for review. The Director, upon his or her option, may act on the appeal either by open hearing or submission of written documents and proof. A decision of the Director is final.

## **VII. PROBLEM STATEMENT**

The federal Forest Resources Conservation and Shortage Relief Act of 1990 (16 USCA 620c *et seq.*) and related regulations promulgated there-under by the Department of Commerce prohibit the export of unprocessed timber from nonfederal public lands in Western states. This regulatory construct also places significant controls on the "substitution" of unprocessed public timber for unprocessed private timber that has been or will be exported by a given party. In addition, there is a provision for the Secretary of Commerce to designate certain species as "surplus to the needs of timber manufacturing facilities in the United States," and remove these species from export restrictions [16 USCA 620c(j)].

The small number of timber purchasers in California, exerts downward pressure on demand for timber from Demonstration State Forests and public community forests in California. For example, the City of Arcata's Community Forest has encountered significant problems in successfully selling the logs from its one timber sale per year, because their usual log buyer is now involved in the export market for private logs. The major species sold by Arcata is redwood, but their usual purchaser of these logs does not export redwood; rather, they export other conifer species that are not a product substitute for redwood. Also, Arcata has had difficulty selling grand fir and Sitka spruce logs because of a lack of purchasers interested in domestic processing; however, there are export markets for these logs. Based on Arcata's market experience, these species are "surplus to the needs of timber manufacturing facilities in the United States."

Sales from the Demonstration State Forests could be reduced because of the market situation described above. The Department manages approximately 71,000 acres of timberland in the state. The Department's two forests in coastal areas, Jackson Demonstration State Forest in Mendocino County and Soquel Demonstration State Forest in Santa Cruz County, are most susceptible to reduced demand effects due to the substitution restrictions. Taken together, these two forests comprise 51,330 acres, or 72 percent of the Demonstration State Forest system. Since they are predominantly high-value redwood timber forests, they produce by far the majority of timber sale revenues for the Department. Hence, the factors of strict substitution restrictions, active export markets, and a limited number of timber buyers to begin with, can have a very significant impact on demand and prices for timber from these forests.

At one level, this is a small problem, because non-federal public timber sales account for less than an estimated 3 percent of all timber sales in the state. On the other hand, the public entities selling this timber are highly dependent upon timber sales for the revenues to continue the management of their lands and the operation of their related



programs, such as research, demonstration of sustainable forest management techniques, and public recreation.

The states of Oregon and Washington have formal, Secretary-of-Commerce-approved programs in place that provide further definition of and flexibility regarding what constitutes substitution of public timber for exported private timber. These programs also include designated sourcing areas, with provisions that substitution is not considered to occur between public timber and private timber between the sourcing areas. Further, the State of Washington applies a restrictive, three-part test to determine whether a public timber purchaser may be subject to substitution restrictions [WAC 240-15-010(4)(h)(i)].

The federal law provides that there is a two-year look-back from the date of a public timber sale for substitution effects. Federal law does not specify a period for looking forward from the date of a public timber sale; i.e., how long after a public timber sale purchase must a buyer refrain from exporting unprocessed private logs to avoid substitution? Washington State has a two-year forward-looking policy [WAC 240-15-010(4)(h)(ii)(B)]; Oregon has a forward-looking policy that terminates at the time that a purchaser's state timber sale contracts end [OAR 141-016-0010(1)(d)].

### **Pursuing an Advisory Opinion from the Department of Commerce**

Specific flexibilities to explore are:

1. A provision that substitution does not occur between hardwood and softwood logs, since they produce distinctly different products and move in different markets;
2. A provision that substitution does not occur between redwood and other softwood logs, since they produce distinctly different products that do not substitute for one another in markets;
3. Provision for a three-part test similar to Washington as to whether substitution restrictions apply:

"Substitution" means the purchase of export restricted timber or possession of an active sale contract for export restricted timber by

(A) a person who owns and operates a processing facility (B) where the person owning the processing facility also exports or sells for export from the United States unprocessed timber originating from private lands in the state of Washington and (C) where such lands are owned by the person, or the person has exclusive rights to harvest timber from such lands, where such rights may be exercised at any time during a period of more than seven years. Substitution can occur only when all three above noted conditions are met. Exceptions to this seven year restriction may be considered on a case by case basis by the department of revenue in exceptional circumstances. [WAC 240-15-010(4)(h)(i)]

4. Provision for a forward-looking substitution restriction similar to Oregon's; i.e., that terminates at the time that a purchaser's public timber sale contracts end.

5. A determination by the Secretary of Commerce that grand fir and Sitka spruce logs from California are “surplus to the needs of timber manufacturing facilities in the United States.”
6. Establishing at least two “sourcing areas,” such as Coastal and Interior California, where substitution is not considered to occur between public and private timber between the two areas.

## Regulations

A General Order is a rule (**not a regulation**) which contains various procedures:

“the Secretary of Commerce issued a General Order prohibiting the export of unprocessed timber originating from public lands located west of the 100th meridian in the contiguous United States. In addition, the Order prohibits certain unprocessed timber substitutions between public and private lands, **provides certain exemptions from this prohibition**, and includes definitions and contract sanctity provisions for certain prior contracts.”

The GO provides for an exemption:

“(d) Exemption. Pursuant to section 491(b)(3)(B) (16 U.S.C. 620c(b)(3)(B)) of the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, the prohibitions in section (c) of this Order do not apply in a state on or after the date on which: (1) The Governor of that state provides the Secretary of Commerce with notification of a prior state program under section 491(d)(2)(C) (16 U.S.C. 620c(d)(2)(C)) of the Act; [FNI] (2) **the Secretary of Commerce approves a state program under section 491(d)(2)(A) (16 U.S.C. 620c(d)(2)(A)) of the Act**, or (3) the Secretary of Commerce issues implementing regulations under the Act, whichever occurs first.”

In sum, there are no regulations, except for those specific to Western Red Cedar, and a state program could be moved to the Secretary.

### **(d) Authorized State programs**

#### **(1) Authorization of new State programs**

Notwithstanding subsection (c) of this section, the Governor of any State may submit a program to the Secretary of Commerce for approval that—

**(A)** implements, with respect to unprocessed timber originating from public lands in that State, the prohibition on exports set forth in the Secretary’s order under subsection (a) of this section; and

**(B)** ensures that the species, grades, and geographic origin of unprocessed timber prohibited from export within the State is representative of the species, grades, and geographic origin of timber comprising the total timber sales program of the State.

#### **(2) Approval of State programs**

##### **(A) Program approval**

Not later than 30 days after the submission of a program under paragraph (1), the Secretary of Commerce shall approve the program unless the Secretary finds that the program will result in the export of unprocessed timber from public lands in violation of sections [620](#) to [620j](#) of this title and publishes that finding in the Federal Register.

##### **(B) State program in lieu of Federal program**

If the Secretary of Commerce approves a program submitted under paragraph (1), the Governor of the State for which the program was submitted, or such other official of that State as the Governor may designate, may administer and enforce the program, which shall apply in that State in lieu of the regulations issued under subsection (c) of this section.

Or:

**h) Removal or modifications of State restrictions**

Based upon a determination that it is in the national economic interest, the President may remove or modify any prohibition on exports from public lands in a State if that State petitions the President to remove or modify such prohibition.

**(j) Surplus timber**

The prohibitions on exports contained in orders of the Secretary of Commerce issued under subsection (a) of this section shall not apply to specific quantities of grades and species of unprocessed timber originating from public lands which the Secretary concerned determines by rule to be surplus to the needs of timber manufacturing facilities in the United States. Any such determination may, by rule, be withdrawn by the Secretary concerned if the Secretary determines that the affected timber is no longer surplus to the needs of timber manufacturing facilities in the United States.

**(k) Suspension of prohibitions**

Notwithstanding any other provision of this section, beginning on January 1, 1998, and annually thereafter, if the President finds, upon review of the purposes and implementation of sections [620](#) to [620j](#) of this title, that the prohibitions on exports required by subsection (a) of this section no longer promote the purposes of sections [620](#) to [620j](#) of this title, then the President may suspend such prohibitions, except that such suspension shall not take effect until 90 days after the President notifies the Congress of such finding.

**VIII. PROPOSED LAW (BASED ON WASHINGTON CODE 240-15-010)**

**§1515 Export of Unprocessed Timber**

(a) Applicability. This chapter shall apply to the sale of timber originating from public lands in the state of California, when such timber is subject to an order issued by the Secretary of Commerce of the United States under section 491(a) of the Forest Resources Conservation and Shortage Relief Act of 1990 (Public Law 101-382). Western Red Cedar is exempt from these rules. The prohibition on the export of Western Red Cedar is covered by section 7(i) of the Export Administration Act of 1979 (50 U.S.C. App. 2406 (i)).

(b) Presidential action. This chapter shall not apply to the extent that an order referred to under §1515 (a) is suspended, removed, or modified by the President of the United States under the authority of section 491(e) or 491(f) of the Forest Resources Conservation and Shortage Relief Act of 1990 (Public Law 101-382).

(c) Surplus timber. Timber which has been determined to be surplus to the needs of timber manufacturing facilities in the United States by the Secretary of Agriculture or the Secretary of the Interior of the United States is not subject to regulation under this chapter.

(d) Definitions. As used in this chapter:

(1) "Agency" means any state or local public entity which owns or manages land from which timber is harvested in the state of California.

(2) "Export" means either to load on a conveyance or vessel or put in a log raft with the intent to ship to a foreign destination, or to place at a facility such as a port, yard, pond, or dock with the intent to load on a conveyance or vessel or put in a log raft for shipment to a foreign destination.

(3) "Export restricted timber" means unprocessed timber originating from a sale of timber from public lands which has been designated as export restricted under §1516 (a)(1), and includes both logs and stumpage originating from such a sale.

(4) "Person" means any individual, partnership, corporation, association, or other legal entity and includes any subsidiary, subcontractor, parent company and business affiliates where one affiliate controls or has the power to control the other or when both are controlled directly or indirectly by a third person.

(5) "Processing facility" means a facility for converting unprocessed timber into any of the items of processed timber listed in §1515 (d)(9). Chip plants, pulp mills and facilities that process only Western Red Cedar Products are not considered processing facilities.

(6) "Public lands" means lands in the state of California that are held or owned by the state of California, or a political subdivision thereof, or any other public agency. Such term does not include any lands the title to which is:

(A) Held by the United States,

(B) Held in trust by the United States for the benefit of any Indian tribe or individual, or

(C) Held by any Indian tribe or individual subject to a restriction by the United States against alienation.

(7) "Purchaser" means a person who has been awarded a timber sale contract to harvest or acquire export restricted timber from public lands in the state of California.

(8)(A) "Substitution" means the purchase of export restricted timber or possession of an active sale contract for export restricted timber by (A) a person who owns and operates a processing facility (B) where the person owning the processing facility also exports or sells for export from the United States unprocessed timber originating from private lands in the state of California and (C) where such lands are owned by the person, or the person has exclusive rights to harvest timber from such lands, where such rights may be exercised at any time during a period of more than seven years. Substitution can occur only when all three above noted conditions are met. Exceptions to this seven year restriction may be considered on a case by case basis by the department of revenue in exceptional circumstances.

(B) The reference in §1515 (d)(8)(A) to the export from the United States of unprocessed timber originating from private lands shall mean exports which occur at any time:

(1) After that date which is twelve months prior to the award date of the sale of the export restricted timber; and

(2) Prior to that date which is twenty-four months after the award date of the sale of the export restricted timber, or the end of the term of the timber sale contract for the export restricted timber, whichever is later.

(9) "Unprocessed timber" means trees or portions of trees or other roundwood not processed to standards and specifications suitable for end product use. As used in this chapter, the term "unprocessed timber" does not include timber processed into any one of the following:

(A) Lumber or construction timbers, except Western Red Cedar, meeting current American Lumber Standards grades or Pacific Lumber Inspection Bureau Export R or N list grades, sawn on 4 sides, not intended for remanufacture.

(B) Lumber, construction timbers, or cants for remanufacture, except Western Red Cedar, meeting current American Lumber Standards grades or Pacific Lumber Inspection Bureau Export R or N list clear grades, sawn on 4 sides, not to exceed 12 inches in thickness.

(C) Lumber, construction timbers, or cants for remanufacture, except Western Red Cedar, that do not meet the grades referred to in clause 2 and are sawn on 4 sides, with wane less than 1/4 of any face, not exceeding 8 3/4 inches in thickness.

(D) Chips, pulp or pulp products.

(E) Veneer or plywood.

(F) Poles, posts, or piling cut or treated with preservatives for use as such.

(G) Shakes or shingles.

(H) Aspen or other pulpwood bolts, not exceeding 100 inches in length, exported for processing into pulp.

(I) Pulp logs or cull logs processed at domestic pulp mills, domestic chip plants, or other domestic operations for the purpose of conversion of the logs into chips.

#### §1516 Prohibitions.

(a) Prohibition on export. Except as specifically provided under this chapter, no person may:

(1) Export from the United States export restricted timber; or

(2) Sell, trade, exchange, or otherwise convey to any other person, for the purpose of export from the United States, export restricted timber.

(b) Prohibition on substitution. Except as specifically provided under this chapter, no person may purchase or possess an active contract for export restricted timber from any agency if such person owns and operates a processing facility and the processing of export restricted timber at such facility by such person would constitute substitution.

(c) Prohibition on certain indirect transactions. Except as specifically provided under this chapter, no person may purchase from any other person export restricted timber if such person is prohibited under §1516 (b) (relating to substitution) from purchasing such timber directly from the agency managing the public lands from which such timber originated.

(d) Exemptions. Notwithstanding any other provisions of this chapter;

(1) The prohibition in §1516 (b) (relating to substitution) shall not apply to the use of timber originating from public lands which is either (i) hardwood timber, or (ii) Western Red Cedar.

(2) The prohibition in §1516 (b) (relating to substitution) shall not apply to any log, regardless of gross scale, sold to a domestic processing facility for the purpose of conversion into chips, pulp or pulp products.

#### §1517 Agency requirements.

(a) Designation of export restricted timber.

(1) Each agency managing public lands subject to this chapter shall designate timber sales to be sold as export restricted and as exportable.

(2) Designation of timber sales as export restricted and as exportable shall be on a sale by sale basis and shall apply to the entire sale being considered.

(b) Report to the Department. By March 31 of each year, each agency selling timber from public lands shall report to the governor on the results of its sales program in compliance with the Forest Resources Conservation and Shortage Relief Act (Public Law 101-382) for the preceding calendar year. The report shall include information on the volume, species, grade, and geographical distribution of sales sold as export restricted and not export restricted.

(c) Reports on the purchase of timber. Not later than five days after the receipt of a Purchaser Certification furnished to an agency under §1517, the agency shall submit a copy of such certification to the Department of Forestry and Fire Protection. The agency shall make copies of such reports available to the public at reasonable times and locations.

(d) Contract provisions. Agencies contracting for the sale of export restricted timber from public lands shall include in such contracts clauses incorporating the applicable requirements of §1516 (relating to the prohibitions on export and substitution), §1518 (relating to reporting requirements), and §1519 (relating to enforcement). In addition, such contracts shall include clauses which provide that a violation by the purchaser of the prohibitions under §1516 (relating to the prohibitions on export and substitution) shall be sufficient cause for the agency to cancel the contract.

(e) Prohibition on accepting bids from ineligible purchasers. Agencies shall not accept bids for sales of export restricted timber from persons included on the list of ineligible purchasers published by the Department.

(f) List of ineligible purchasers. Agencies contracting for the sale of export restricted timber from public lands shall attach to such contracts a copy of the most recent list of ineligible purchasers published by the Department.

#### §1518 Reporting requirements.

(a) Purchaser certification. Prior to issuing a contract for the sale of export restricted timber, an agency which has offered such timber for sale shall require that the purchaser submit two signed copies of a purchaser certification, in such form as the department of revenue may require, which affirms, under penalty of law, the truth of each of the following:

(1) That such timber, while still in unprocessed form, will not be:

(A) Exported by the purchaser or used in substitution by the purchaser; or

(B) Transferred to any other person for the purpose either of export or to be used in substitution.

(2) That hammer brands and red paint applied to such timber as required by this chapter shall remain on such timber until it is domestically processed.

(3) That prior to selling, trading, exchanging, or otherwise conveying any timber which is export restricted timber to any other person, the purchaser (transferor) shall require the transferee to provide to the purchaser (transferor) two signed copies of a completed transferee certification, in such form as the department of revenue shall require; and that the purchaser (transferor) shall provide the department with one copy not later than five days after receipt from the transferee.

(4) That the purchaser (transferor) shall not sell, trade, exchange, or otherwise convey export restricted timber to any person identified on the list of ineligible purchasers published by the department of revenue under this chapter.

(b) Transferee certification. Any person possessing export restricted timber shall, prior to selling, trading, exchanging, or otherwise conveying such timber to any other person, require the transferee to provide to the transferor two signed copies of a completed transferee certification, in such form as the department of revenue shall require. The transferee certification shall include an affirmation, under penalty of law, as to the truth of each of the items required to be affirmed in a purchaser certification, (except insofar as the transfer is pursuant to §1516(d)(2) (relating to certain indirect transactions)[)] as well as the quantity of export restricted timber which is being transferred. The transferor shall provide to the department of revenue one signed copy of the transferee certification not later than five days after the receipt from the transferee.

(c) Reporting requirements for certain purchasers of export restricted timber. Any person who:

(1) Processes export restricted timber, and

(2b) Either owns forest lands the state of California, shall, for purposes of the reporting requirements under this section, treat any timber harvested from lands referred to in §1518 (c)(2) during the period of time referred to under §1515 (d)(8)(B)(2) as though it were export restricted timber originating from public lands. However, nothing in this section shall require painting or branding of timber originating on private lands.

(d) Every person who purchases export restricted timber or who comes into possession of export restricted timber shall keep and preserve for a period of five years, suitable records as may be necessary to determine the final distribution and use of such export restricted timber, and the final distribution and use of timber which is subject to the prohibition against substitution in §1516 (b).

#### §1519 Enforcement.

(a) Debarment.

(1) Any person who knowingly violates any of the prohibitions in §1516(a) (relating to exports), §1516 (b) (relating to substitution), or §1516 (c) (relating to certain indirect transactions) shall be debarred, by an order issued by the department of revenue from bidding on or purchasing export restricted timber originating from any public lands covered by this chapter for a period of two years.



(2) A second debarment of any person under this section which is for a violation by the same person committed after the first debarment of such person under this section shall result in a permanent debarment of such person from bidding on or purchasing export restricted timber originating from any public lands covered by this chapter.

(3) The California Administrative Procedure Act shall apply to the issuance of any order by a state agency under this subsection. Agencies other than state agencies shall follow appropriate procedures in issuing any order under this subsection.

(4) For purposes of this section, the term "person" shall include any previously formed but no longer existing entity which would be included in §1515 (d)(4) if existing now.

(b) Log branding and marking requirements.

(1) (A) All log ends 10 inches or greater in diameter from sales of unprocessed timber by a public agency covered by this chapter shall, prior to removal from the sale area, be hammer branded.

(B) In addition to the branding requirements of §1519 (b)(1)(A), both ends of all logs from those sales designated as export restricted under §1517 (a)(1) shall, prior to removal from the sale area, be painted with durable red paint.

(2) If timber that has been properly marked and branded, as required under §1519 (b)(1), is subdivided into smaller pieces for any purpose other than immediate processing, each piece shall be marked in the same manner as the original timber.

## APPENDIX

### GENERAL ORDER ISSUED 1993 REGARDING EXPORTS

Bureau of **Export** Administration (Docket No. 931071-3271)

**General Order Prohibiting Exports** of Unprocessed Timber From Certain Public Lands Monday, October 25, 1993

**\*55038** AGENCY: Bureau of **Export** Administration, Commerce. ACTION: Notice of **general order** on log **exports**.

SUMMARY: On **August 23, 1993**, pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990, as amended ("Act"), the Secretary of Commerce issued a **General Order prohibiting the export** of un- processed timber originating from public lands located west of the 100th meridian in the contiguous United States. In addition, the **Order prohibits** certain unprocessed timber substitutions between public and private lands, provides certain exemptions from this **prohibition**, and includes definitions and contract sanctity provisions for certain prior contracts.

As a result, **exports** of unprocessed timber originating from public lands located west of the 100th meridian in the contiguous United States are **prohibited**, effective June 1, **1993**.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July **1, 1993**, the President signed into law Pub. L. 103-45, the Forest Resources Conservation and Shortage Relief Amendments Act of **1993** ("Amendments"). This law amended the Act. The Act requires the Secretary of Commerce to issue an **Order prohibiting the export** of unprocessed timber originating from public lands west of the 100th meridian in the contiguous U.S. Before the Amendments were enacted, the Act required affected states to issue and implement their own timber **export** regulations in accordance with the Act and previous **Orders** of the Secretary of Commerce. On May 4, **1993**, following a legal challenge, the U.S. Court of Appeals for the Ninth Circuit ("Court of Appeals") held provisions of the Act requiring states to implement the Federal **prohibition** in this manner unconstitutional. *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. **1993**).

In passing the Amendments, Congress intended to remedy the provisions the Court of Appeals ruled unconstitutional by assigning certain regulatory responsibilities to the Federal government, specifically, the Secretary of Commerce.

The Act, however, allows a state to elect to implement a timber export program under its own state regulatory procedures if the Secretary of Commerce reviews and approves it. Finally, as an interim measure, the Act allows states with timber export programs implemented under the Act, which existed before the Amendments became law, to continue to administer that program pending implementation

of Federal regulations. In the 30-day period allowed under the Amendments for notification to Commerce of pre-existing state programs, the State of Washington was the only state to do so.

The states affected by this Order are: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

The Secretary's General Order prohibits unprocessed timber exports from public lands as follows: (1) Effective June 1, 1993, for affected states with annual sales of 400 million board feet ("MMBF") or less; and (2) effective June 1, 1993, and ending on December 31, 1995, for affected states with annual sales greater than 400 MMBF.

At present, only the State of Washington's annual sales are greater than 400 MMBF; all other states' are 400 MMBF or less. Therefore, the Secretary's prohibition is permanent for all affected states except the State of Washington. In 1995, the Secretary of Commerce will establish the level of exports for unprocessed timber from public lands in the states with annual sales greater than 400 MMBF, to be effective January 1, 1996.

The Secretary's Order prohibits substitution. No person may purchase, directly or indirectly, unprocessed timber originating from public lands in an affected state: (1) If such purchaser would use the unprocessed timber as a substitute for exported unprocessed timber originating from private lands in that state; or (2) if the purchaser, during the preceding 24-month period, exported unprocessed timber originating from private lands in that state. These substitution prohibitions, however, will not apply in a state on or after the date on which: (1) The Governor of that state provides the Secretary of Commerce with notification of a prior state program under section 491(d)(2)(C) (16 U.S.C. 620c(d)(2)(C)) of the Act (that is, one that existed before the Amendments became law); (2) the Secretary of Commerce approves a state program under section 491(d)(2)(A) (16 U.S.C. 620c(d)(2)(A)) of the Act (that is, when a state submits a program for Commerce approval), or (3) the Secretary of Commerce issues implementing regulations under the Act, whichever occurs first.

The unprocessed timber export prohibition is comprehensive. At this time, the Act provides no exceptions based on species, grades, or location within public lands. The Act, however, does provide contract sanctity for any contract for the purchase of unprocessed timber from public lands entered into before: (1) September 10, 1990, for all affected states other than the State of Washington; (2) January 1, 1991, for the State of Washington; or (3) October 23, 1992, for states in which exports were permitted pursuant to prior orders of the Secretary of Commerce.

Consistent with section 491(f) (16 U.S.C. 620c(f)) of the Act, this order shall not be construed to supersede the controls on the export of Western Red Cedar required by section 7(i) of the Export Administration Act of 1979, as amended (50 U.S.C. App. 2406(i)), and as set out in §777.7 of the Export Administration Regulations (15 CFR 777.7).

The Act also requires the Department of Commerce to: (1) Promulgate and administer regulations to implement the Act; (2) ensure that species, grades, and geographic origin of unprocessed timber

prohibited from export within each state is representative of the timber comprising the total timber sales program of the state; (3) to monitor sales and purchases of unprocessed public timber between persons; (4) review and approve or disapprove state programs submitted by states that elect to implement their own timber export program; (5) publish in the Federal Register any notices of a finding that a state program submitted for Department of Commerce approval is disapproved; (6) investigate violations of, enforce, and conduct civil penalty hearings under the Act; and (7) report to Congress on the effect of the ban by June 1, 1995. The Department of Commerce will publish proposed regulations and solicit public comments in the Federal Register to implement these provisions.

Accordingly, the Secretary of Commerce issued the following General Order on August 23, 1993: General Order Prohibiting Exports of Unprocessed Timber From Certain Public Lands

The Forest Resources Conservation and Shortage Relief Amendments Act of 1993, Public Law 103-45, July 1, 1993, amended the Forest Resources Conservation and Shortage Relief Act of 1990, Public Law 103-382, 104 Stat. 714, August 20, 1990 (16 U.S.C. 620 et seq.) ("Act"). The Act, as amended, requires the Secretary of Commerce to issue an Order prohibiting, notwithstanding any other provision of the law, the export of unprocessed timber originating from public lands west of the 100th meridian in the contiguous United States as follows: (1) Effective June 1, 1993, for states with annual sales of 400 million board feet ("MMBF") or less; and (2) effective June 1, 1993, and ending December 31, 1995, for states with annual sales greater than 400 MMBF. The Act also requires me to prohibit substitutions, provide exemptions therefrom, and provide for contract sanctity. This order is being issued pursuant to provisions of the Act.

- (a) Timber originating from public lands in states with annual timber sales volumes of 400,000,000 board feet ("MMBF") or less. Pursuant to section 491 (a) and (b)(1) (16 U.S.C. 620c (a) and (b)(1)) of the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, and, notwithstanding any other provision of the law, effective June 1, 1993, the export from the United States to any destination, including Canada, of any unprocessed timber originating from public lands in states located west of the 100th meridian in the contiguous United States with annual timber sales volumes of 400 MMBF or less is prohibited.
- (b) Timber originating from public lands in states with annual timber sales volumes greater than 400 MMBF. Pursuant to section 491 (a) and (b)(2) (16 U.S.C. 620c(a) and (b)(2)) of the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, effective June 1, 1993, and ending on December 31, 1995, the export from the United States to any destination, including Canada, of any unprocessed timber originating from public lands in states located west of the 100th meridian in the contiguous United States with annual timber sales volumes greater than 400 MMBF is prohibited.
- (c) Prohibition on substitution. Pursuant to section 491(b)(3)(A) (16 U.S.C. 620c(b)(3)(A)) of the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, and notwithstanding any other provision of law, all persons are prohibited from purchasing, directly or indirectly, unprocessed timber originating from public lands in a state if: (1) Such unprocessed timber would

be used in substitution for exported unprocessed timber originating from private lands in that State; or (2) such person has, during the preceding 24-month period, exported unprocessed timber originating from private lands in that State.

- (d) Exemption. Pursuant to section 491(b)(3)(B) (16 U.S.C. 620c(b)(3)(B)) of the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, the prohibitions in section (c) of this Order do not apply in a state on or after the date on which: (1) The Governor of that state provides the Secretary of Commerce with notification of a prior state program under section 491(d)(2)(C) (16 U.S.C. 620c(d)(2)(C)) of the Act;[FNI] (2) the Secretary of Commerce approves a state program under section 491(d)(2)(A) (16 U.S.C. 620c(d)(2)(A)) of the Act, or (3) the Secretary of Commerce issues implementing regulations under the Act, whichever occurs first.

On July 6, 1993, the Governor of the State of Washington provided the Secretary of Commerce with written notification of a prior state program under the provisions of this section.

- (e) Prior contracts. Pursuant to section 491(e) (16 U.S.C. 620c(e)) of the Forest Resources Conservation and Shortage Relief Act of 1990, as amended, this Order does not apply to any contract for the purchase of unprocessed timber from public lands entered into before September 10, 1990, with respect to states with annual sales volumes of 400 MMBF or less, or January 1, 1991, with respect to states with annual sales volumes greater than 400 MMBF, or any contract under which exports were permitted pursuant to an Order of the Secretary of Commerce in effect under the Act before October 23, 1992.
- (f) Western Red Cedar. Consistent with section 491(f) (16 U.S.C. 620c(f)) of the Act, this Order shall not be construed to supersede the controls on the export of Western Red Cedar required by section 7(i) of the Export Administration Act of 1979 (50 U.S.C. app. 2406(1)), and as set out in section 777.7 of the Export Administration Regulations (15 CFR 777.7).
- (g) Definitions. (1) Public lands. As defined in section 493(5) (16 U.S.C. 620e(5)) of the **\*55040** Act, "public lands" means lands west of the 100th meridian in the contiguous 48 states that are held or owned by a State or political subdivision thereof, or any other public agency. Such term does not include any lands the title to which is:

- (i) held by the United States;

- (ii) held in trust by the United States for the benefit of any Indian tribe or individual;

- (iii) held by any Indian tribe or individual subject to a restriction by the United States against alienation; or

- (iv) held by any Native Corporation as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

- (2) Unprocessed Timber. As defined in section 493(7) (16 U.S.C. 620e(7)) of the Act, the term "unprocessed timber" means trees or portions of trees or other roundwood not processed to

standards and specifications suitable for end product use. The term "unprocessed timber" does not include timber processed into any one of the following:

- (i) Lumber or construction timbers, except Western Red Cedar, meeting current American Lumber Standard Grades or Pacific Lumber Inspection Bureau Export "R" or "N" list grades, sawn on 4 sides not intended for re-manufacture.
  - (ii) Lumber, construction timbers, or cants for remanufacture, except Western Red Cedar, meeting current American Lumber Standards Grades or Pacific Lumber Inspection Bureau Export "R" or "N" list clear grades, sawn on four sides, not to exceed twelve inches in thickness.
  - (iii) Lumber, construction timbers, or cants for remanufacture, except Western Red Cedar, that do not meet the grades referred to in clause (ii) and are sawn on four sides, with wane less than one-quarter of any face, not exceeding eight and three-quarters inches in thickness.
  - (iv) Chips, pulp, or pulp products.
  - (v) Veneer or plywood.
  - (vi) Poles, posts, or piling cut or treated with preservatives for use as such.
  - (vii) Shakes or shingles.
  - (viii) Aspen or other pulpwood bolts, not exceeding 100 inches in length, exported for processing into pulp.
  - (ix) Pulp logs or cull logs processed at domestic operations for the purpose of conversion of the logs into chips.
- (3) Substitution. Consistent with the language contained in section 493(8) ( 16 U.S.C. 620e(8)) of the Act, the acquisition of unprocessed timber from public lands west of the 100th meridian in the contiguous 48 states to be used in "substitution" for exported unprocessed timber originating from private lands means acquiring unprocessed timber from such public lands and engaging in exporting, or selling for export, unprocessed timber originating from private lands within the same geographic and economic area.
- (4) Acquisition. As defined in section 493(1) (16 U.S.C. 620e (1)) of the Act, the term "acquire" means to come into possession of, whether directly or indirectly, through a sale, trade, exchange, or other transaction, and the term "acquisition" means the act of acquiring.
- (5) Person. As defined in section 493(3) (16 U.S.C. 620e(3)) of the Act, the term "person" means any individual, partnership, corporation, association, or other legal entity and includes any subsidiary, subcontractor, or parent company, and business affiliates where one affiliate controls or has the power to control the other or when both are controlled directly or indirectly by a third person.

